

2

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

3 IN THE MATTER OF )  
4 CHAE HWAN CHO, )

5 Appellant, )

6 v. )

7 PUGET SOUND AIR POLLUTION )  
CONTROL AGENCY, )

8 Respondent. )  
9

PCHB No. 85-52 and 85-75

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

10 THIS MATTER, the appeal of two Notices and Orders of Civil Penalty  
11 for violation of PSAPCA's Regulation I for emitting opaque smoke which  
12 interfered with a neighbor's enjoyment of life and property, came on  
13 for formal hearing before the Board August 7, 1985, at Seattle,  
14 Washington. Seated for and as the Board were Lawrence J. Faulk, Wick  
15 Dufford, and Gayle Rothrock (presiding). Lynn Tarry, court reporter,  
16 recorded the proceedings.

17 Witnesses were sworn and testified. Exhibits were examined and  
18 admitted. Argument was heard. From the testimony, evidence, and

1 contentions of the parties, the Board makes these

2 FINDINGS OF FACT

3 I

4 Respondent, pursuant to RCW 43.21B.260, has filed with this Board  
5 a copy of its Regulation I, of which we take judicial notice.

6 II

7 On December 26 and 28, 1984 and again on March 7, 1985, complaints  
8 from a neighboring residence whose home is 20 feet away from  
9 appellant's home, were filed with respondent PSAPCA about dense  
10 rolling smoke coming out of appellant's chimney and coming over under  
11 house eaves and into the backyard. The complainant asserted this  
12 caused him distress (burning eyes, stomach distress) and interfered  
13 with his enjoyment of his good health and his property. This same  
14 neighbor asserted he had complained to PSAPCA about this kind of event  
15 on as many as 64 occasions. The properties are in south Seattle.

16 III

17 On each of three occasions, noted above, inspectors from  
18 respondent agency visited the two adjoining properties and properly  
19 positioned themselves to observe the chimney and smoke. They each  
20 noted white-grayish smoke emitting of such density and duration as to  
21 exceed the 20% opacity limit for more than three minutes in any one  
22 hour. The smoke did rise and roll over onto the neighbor's property.  
23 Photos were taken and visible emissions worksheets were filled out.

24 In each instance, the inspector attempted to contact appellant at  
25 his home and succeeded in contacting the neighbor at his home. In

26 Final Findings of Fact,  
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1 each case, a field notice of violation was left at appellant's home;  
2 telephone and personal contact having not been successful.

3 IV

4 At some time up to three years ago, the appellant and his neighbor  
5 had discussions about the offending smoke coming from the Orley wood  
6 insert fireplace fires in appellant's home. These fires are the only  
7 source of heat appellant elects most of the time due to the cost of  
8 electric or gas residential heating.

9 As a result of discussions, appellant increased the height of his  
10 chimney by approximately two feet in an attempt to gain more loft for  
11 the smoke and a different dispersion pattern. That apparently was not  
12 successful.

13 V

14 Appellant believes he purchased a quality airtight wood insert.  
15 He had it installed by an authorized dealer about two or three years  
16 ago and, it seemed to be working alright and not putting out an  
17 unusual amount of smoke.

18 No evidence or testimony was presented to indicate appellant had  
19 the insert rechecked by the authorized dealer for its performance.  
20 Apparently, no advice or information on chimney height or angle or  
21 outlet was made available to him by knowledgeable sources.

22 Appellant cannot ascertain a new course of action which would  
23 resolve the smoke problem, short of ceasing use of his fireplace or  
24 removing the wood insert.

VI

PSAPCA contacted appellant and asked him to come to a meeting in downtown Seattle at PSAPCA's offices to discuss the smoke problem and the field notices of violation. Much discussion occurred at the February 22, 1985 meeting. Appellant contended that no correction could be made but advised that he usually does not operate the wood insert "stove" during daylight hours and he uses only cord wood and a few newspapers to start a fire. He was advised by PSAPCA officials that a wood insert tends to cause a greater amount of smoke due to lack of combustion air in the fire. Additionally, he was advised that the meeting did not prevent the agency from pursuing further enforcement action.

For whatever reason, Chae Hwan Cho was surprised when the agency elected to levy penalties for the incidents on December 26 and 28, 1984.

VII

On March 12, 1985, respondent PSAPCA issued formal Notice and Order of Civil Penalty for \$50 to appellant for the matters observed on December 26, 1984. He appealed that to this Board on April 10, 1985.

VIII

Thereafter on April 12, 1985, the respondent agency issued appellant a second Notice and Order of Civil Penalty for the smoke incident of December 28, 1985. This time the penalty was levied at \$100. Appellant appealed the penalty on May 10, 1985. Each of the Final Findings of Fact, Conclusions of Law & Order PCHB No. 85-52 & 85-75

1 penalty orders alleged violation of both the opacity standard and  
2 nuisance clause, prohibiting emission of any air contaminant which  
3 interferes with enjoyment of life and property.

4 IX

5 Any Conclusion of Law hereinafter determined to be a Finding of  
6 Fact is hereby adopted as such.

7 From these Facts the Board comes to these

8 CONCLUSIONS OF LAW

9 I

10 The Board has jurisdiction over these persons and these matters.  
11 Chapters 43.21B and 70.94 RCW.

12 II

13 The statutory basis for the violations at issue is found in the  
14 Washington Clean Air Act, chapter 70.94 RCW. The statute contains no  
15 provisions which generally exempt the operation of domestic fireplaces  
16 or wood stoves in residences from air pollution control regulations  
17 adopted under its authority. See RCW 70.94.011, 70.94.040, 70.94.141.

18 Where such exemption has been intended with respect to particular  
19 requirements, the legislature has expressly so stated. RCW 70.94.152,  
20 70.94.770. See also RCW 70.94.041. We conclude, therefore, that the  
21 violations asserted from the source in question are within the  
22 coverage of the statute.

23 III

24 Appellant violated Section 9.03(b) as alleged, on December 26 and  
25 28, 1985 by causing or allowing an air emission of dense smoke in

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1 excess of the limits established by Regulation I. This regulation o.  
2 PSAPCA is only inapplicable to motor vehicles and aircraft. (See Reg.  
3 1, Section 9.03(f)).

#### 4 IV

5 Appellant violated Section 9.11(a) by allowing smoke to become a  
6 nuisance to a neighboring residence, thus interfering with enjoyment  
7 of life and property there. No source categories are excluded from  
8 section 9.11.

9 PSAPCA has rarely, if ever before, used its prosecutorial  
10 discretion to penalize a homeowner for excessive smoke from wood  
11 burning in a residential fireplace and its effects. We agree that  
12 formal enforcement in matters of this kind should be initiated very  
13 sparingly and then only where alternative approaches to correct a  
14 clearly demonstrated problem have been tried and proven unsuccessful.

15 Such appears to be the case here. While it is obvious that  
16 appellant's neighbor has become a chronic complainer about smoke  
17 invading his property, the evidence shows that on the dates in  
18 question, his complaints had independent verification.

19 When homes are as close together as those of appellant and  
20 complainant, the possibility of reaction to dense smoke increases  
21 exponentially. One's level of expectation and experience with  
22 fireplace fires and smoke also affects the nuisance factor. When  
23 close proximity and high expectation of trouble exists, some physical  
24 placement of the smoke source must be changed and/or the smoke must be  
25 reduced in density and intensity; otherwise the source must be

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1 extinguished altogether.

2 IV

3 The purpose of civil penalties is not primarily punitive but  
4 rather to achieve compliance by changing behavior. Here using part of  
5 the money to achieve an alteration in the smoke source would serve the  
6 purpose of statute law better than payment of the entire \$150 in  
7 penalties levied. A portion of the penalties should be suspended so  
8 appellant's funds can be devoted to having the smoke source checked,  
9 analyzed, and changed in some fashion. Only one-third of the  
10 penalties need be left intact to achieve the deterrence objectives of  
11 the law.

12 VI

13 Any Finding of Fact hereinafter found to be a Conclusion of Law is  
14 hereby adopted as such.

15 From these Conclusions the Board makes this  
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ORDER


PSAPCA Notices and Orders of Civil Penalty No. 6226 and 6241 are affirmed; provided, however, that \$100 is suspended on condition that appellant not violate respondent's regulations for six months from the date of entry of this Order.

DONE this 5th day of September, 1985.

POLLUTION CONTROL HEARINGS BOARD

  
GAYLE ROTHROCK, Chairman

See Dissenting Opinion  
LAWRENCE J. FAULK, Chairman

  
WICK DUFFORD, Lawyer Member



1 LAWRENCE J. FAULK - DISSENTING OPINION

2  
3 I write separately because I believe the result reached by the  
4 majority is unreasonable, unjust to this citizen, and certainly not  
5 required by law.

6 In this case, we have a citizen being fined for burning untreated  
7 wood in his fireplace. The fireplace insert was installed by a  
8 professional. The Department of Ecology made an inspection and  
9 observed the start-up of the fireplace and found that the smoke level  
10 was acceptable. The appellant extended the length of the chimney in  
11 an attempt to alleviate the problem. There is nothing short of not  
12 using his fireplace that would completely eliminate the problem.

13 This is the first case before this Board where the Agency is  
14 applying the opacity standard to a fireplace in a single family home.  
15 This Board is required to find a technical violation of the opacity  
16 standard. However, for this Board to fine a citizen for burning his  
17 fireplace seems to me to be the height of injustice.

18 In determining whether a fine should be sustained against this  
19 citizen, the surrounding facts and circumstances are relevant.  
20 Factors bearing on reasonableness must be considered. These include:

- 21 (a) the nature of the violation;  
22 (b) the prior behavior of the violation; and  
23 (c) actions taken to solve the problem. .

24 Appellant Chae Hwan Cho burned untreated wood in his fireplace  
25 insert, that caused a technical violation of the law. He has had no  
26

1 previous violations and his prior behavior indicates a willingness to  
2 minimize the problem. He extended the chimney to help solve the  
3 problem.

4 On the record before us, I would conclude that assessing a penalty  
5 against Mr. Cho is not justified.

6 In the broader view, I note with deep concern that the opacity  
7 standard is being applied to fireplaces in single family homes. The  
8 record of appeals before this Board indicates that the Agency has  
9 refrained from applying the opacity rule to single family homes from  
10 the time of its inception until now. Though not labeled as such, the  
11 opacity standard has traditionally been applied as a limit for  
12 institutions or industry, and not single family homes.

13 The Clean Air Act sets apart single-family homes so far as outdoor  
14 fires are concerned. RCW 70.94.770. It is doubtful that this  
15 incident would be subject to opacity limits had the same fire occurred  
16 outdoors. Regulation I, Section 8.09 and 8.10. The spirit of setting  
17 apart single family homes has been, until now, upheld through the  
18 apparent non-application of the opacity standard to fireplaces.

19 If the Agency believes that the time has come to commence  
20 regulation of fireplaces in single family homes, this abrupt change in  
21 policy by which opacity rules suddenly become enforced is not the way  
22 to proceed. Rather, a period of public notice should precede this  
23 policy change. In addition, the Agency should adopt rules  
24 specifically addressing fireplace regulation in single family homes to  
25 determine if they would be more suitable than the industrial opacity

1 rule.

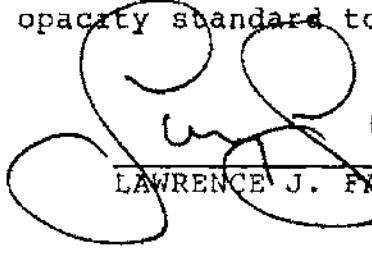
2 The Legislature will be disappointed to learn that in enacting the  
3 Clean Air Act and subsequent amendments, it was allowing a government  
4 agency to fine people for burning wood in their fireplace and causing  
5 some smoke to be emitted. And I think its disappointment will  
6 continue unabated when it discovers that the majority of this Board  
7 has upheld the penalty. The policy for regulation of emissions from  
8 fireplaces in single family homes surely is an appropriate matter for  
9 consideration by the Legislature.

10 Finally, one has to ask what is the result of this decision. In  
11 my view, this Board has given a license to local air agencies to fine  
12 people for opacity violations from their fireplaces. It doesn't make  
13 any sense to me.

14 The public interest would be better served if efforts to inform  
15 citizens of proposed restrictions were more than perfunctory in  
16 matters so basic to the management of households as burning wood in  
17 fireplaces.

18 In any event, it is our job to interpret and apply the statutes in  
19 a manner that furthers justice. I believe the greater justice is  
20 accomplished by finding for the appellant.

21 Therefore, I would find that a technical violation of the Clean  
22 Air Act has occurred and vacate the penalties, because PSAPCA should  
23 not be applying an industrial opacity standard to households.

24  *9/4/85*  
25 LAWRENCE J. FAULK, Chairman  
26

27 DISSENTING OPINION - FAULK  
PCHB No. 85-75